

REPRESENTATIVE FOR PETITIONER: Richard J. Herber, *pro se*

REPRESENTATIVES FOR RESPONDENT: Sarah Schreiber, Haller & Colvin, P.C.  
Mark GiaQuinta, Haller & Colvin, P.C.

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Richard J. Herber,	)	Petition No.: 02-074-17-3-4-02013-17
	)	
Petitioner,	)	Parcel No.: 02-12-08-279-013.000-074
	)	
v.	)	County: Allen
	)	
Allen County Assessor,	)	Assessment Year: 2017
	)	
Respondent.	)	

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**July 17, 2018**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**PROCEDURAL HISTORY**

1. This case has a lengthy history behind it. Although much of this history deals with assessment years no longer under appeal, we give a brief summary because a significant portion of the testimony in this case related to those years.
2. In 2016, Richard J. Herber filed petitions with the Board for the 2003-2005, and 2011-2015 assessments years. The majority of these were Form 133 petitions while one Form 131 petition was filed for the 2003 assessment year. After extensive prehearing litigation, including motions for discovery and summary judgment, the parties submitted

a “Stipulation of Dismissal with Prejudice” for those appeals. The Board issued a Final Determination dismissing those appeals pursuant to the stipulation on April 17, 2017. On June 1, 2017, Herber filed a “Motion to Restore Petitions to Docket” alleging violations of the stipulation agreement. We denied that motion because we have no jurisdiction to reopen appeals after the deadline to petition for rehearing has passed. This order included the sentence: “Should the parties believe there has been a breach of the settlement agreement they must seek relief elsewhere.”

3. In 2017, Herber filed new Form 133 appeals for the 2009 through 2017 assessment years.<sup>1</sup> Again, these appeals were the subject of extensive prehearing litigation including multiple motions to compel, motions to dismiss, and a motion for default judgment. Several of these motions are still pending, which we address later in this determination.
4. Prior to the hearing, the Assessor sued Herber in Allen Superior Court seeking an injunction to enforce the prior settlement agreement by requiring Herber to withdraw his appeals before the Board. Although the Assessor filed numerous motions with the Board regarding these cases, the Assessor never asked the Board to dismiss these appeals based on a prior settlement agreement.<sup>2</sup> Apparently, the Assessor misinterpreted our earlier instruction to the parties to “seek relief elsewhere” as a blanket prohibition on any party seeking to enforce a settlement agreement before the Board.<sup>3</sup> We are unable to express any opinion as to whether such a motion would have been granted because we did not have the benefit of hearing either party’s arguments on this matter. Nevertheless, it is disturbing that the Assessor decided not to make that argument to the Board before resorting to suing a taxpayer in a local court.

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<sup>1</sup> Herber also filed a Form 131 petition for the 2017 assessment year. That appeal is the subject of a separate Final Determination.

<sup>2</sup> The Assessor did move to dismiss the 2009-2013 assessment years on the grounds that (1) they were untimely, (2) the Assessor did not receive proper service, and (3) the requested relief was improper for a Form 133 appeal. The Board did not rule on those motions, which are now moot given that Herber withdrew the appeals for those years.

<sup>3</sup> We note that this order was given in a prior case filed under different cause numbers, and resulted in a denial of Herber’s request to restore his appeals.

5. On April 12, 2018, the Assessor informed the Board that the Allen Superior Court had issued a preliminary injunction that required Herber to withdraw his appeals for all assessment years save 2017. Herber then withdrew those appeals.
  
6. On April 19, 2018, the Board’s designated Administrative Law Judge, Andrew Howell (“ALJ”), held a hearing on Herber’s remaining Form 133 petition. Herber appeared *pro se* and Sarah Schreiber represented the Allen County Assessor. Both Herber and Stacey O’Day, the Allen County Assessor, testified under oath.
  
7. Herber offered the following exhibits:
  - Petitioners’ Ex. 1: Certificate of Survey for subject property dated January 13, 2000,
  - Petitioners’ Ex. 2: Certificate of Survey for subject property dated March 24, 2004,
  - Petitioners’ Ex. 3: Grant of Easement for Sanitary Sewer,
  - Petitioners’ Ex. 4: Excerpts from deed book containing utility easement,
  - Petitioners’ Ex. 5: Grant of Easement for 10” Sanitary Sewer,
  - Petitioners’ Ex. 6: Notice of Sheriff’s Sale,
  - Petitioners’ Ex. 7: Aerial photo of subject property.
  
8. The Assessor offered the following exhibits:
  - Respondent’s Ex. 1: Aerial photo of subject property,
  - Respondent’s Ex. 2: 2017 property record card for subject property,
  - Respondent’s Ex. 3: Plat of Wildwood Village,
  - Respondent’s Ex. 4: Email from Richard Herber to Stacey O’Day dated October 15, 2016,
  - Respondent’s Ex. 5: E-mail from Richard Herber to Sarah Schreiber dated April 18, 2018.
  
9. The record also includes the following: (1) all pleadings, briefs, and documents filed in the current appeals; (2) all orders and notices issued by the Board or our administrative law judge; and (3) a digital recording of the hearing.

## **OBJECTIONS**

10. This was a contentious hearing with numerous objections from both sides. The ALJ ruled on a number of objections during the hearing. The ALJ also took several objections under advisement, which we now address.
  
11. The Assessor objected to Petitioner's Ex. 6, a "Notice of Sheriff's Sale" from 2014, on the grounds that it was hearsay and irrelevant. Herber argued that it was relevant because it was part of the "global history" of his property. While we agree that this document has only marginal relevance to the 2017 assessment, we will not exclude it because it provides perspective on the background of this case. We also note that our rules allow us to admit hearsay provided it does not form the sole basis for our determination, which this document does not.
  
12. Herber objected to Respondent's Ex. 1, a color aerial photo of the subject property, on the grounds that it was not exchanged because he was only given a black and white version of the photo that had poor resolution. Stacey O'Day testified that the color version was used at the PTABOA. 52 IAC 2-7-1 allows the Board to waive exchange deadlines for exhibits that were submitted at a PTABOA hearing. Given that Herber was aware the Assessor intended to submit the photo, and the color version was presented to the PTABOA, we overrule the objection and admit Respondent's Ex. 1. Nevertheless, we caution the Assessor that exchanged exhibits should be the exact version that the parties intend to submit to the Board. We note that this decision does not affect our determination as Petitioner's Exs. 1, 2, and 7 provide sufficient information about the layout of the subject property.
  
13. Herber objected to Respondent's Ex. 3, the plat of the subdivision, on the grounds that it was not exchanged 5 days prior to the hearing. The Assessor admitted that it was only exchanged 1 day prior to the hearing, but argued that it was exchanged at the first available opportunity because the Assessor only learned the nature of Herber's arguments, and thus what evidence they would need to respond, shortly before the

hearing. This argument is undercut by Herber's Form 133, which outlines the general nature of his claims. For that reason, we sustain the objection and exclude Respondent's Ex. 3 from evidence.

14. Herber objected to Respondent's Ex. 4, an email from himself to Stacey O'Day, on the grounds that he did not remember writing it. The Assessor argued that it was an authentic email from Mr. Herber. Stacey O'Day also testified about the e-mail. We overrule Herber's objection and admit Respondent's Ex. 4 into evidence. We do not rely on it in reaching our determination.
15. Herber objected to Respondent's Ex. 5, another email between himself and Stacey O'Day, on the grounds that it was not timely exchanged. The Assessor argued that it could not be timely exchanged because the e-mail was received only one day prior to the hearing. We agree with the Assessor and admit Respondent's Ex. 5 into evidence. We do not rely on it in reaching our determination.
16. The Assessor objected to testimony from Herber regarding who was responsible for maintaining his sewer on the grounds that it was irrelevant. Herber responded that it was relevant because it related to the value of his property and what he could sell it for. We overrule the objection because we find the testimony at least marginally relevant to Herber's claim that the portion of his property covered by the sewer easement should not be assessed.
17. The Assessor objected to a portion of Herber's testimony related to his experiences dealing with the Assessor's office, the assessment history of his property, and the PTABOA hearings. At least some of this testimony is relevant to Herber's Motion for Default Judgment that we address below. Although the rest of the testimony has little bearing on the 2017 assessment year, we will not exclude it because we find it provides important context to the history of this case.
18. The Assessor moved to admit Stacey O'Day as an expert witness based on her experience and training in assessment. Herber objected on the grounds that she had been an expert

witness in other cases that she had lost before the Indiana Tax Court. He also noted that it was prohibitively expensive for him to hire an expert witness. We find O’Day’s experience and qualifications are sufficient for her to provide expert testimony on assessment issues. In addition, Herber’s decision not to hire his own expert is not a legal ground for excluding another witness. Thus, his objection is overruled.

19. On cross-examination, Herber questioned O’Day about whether she had been sued during her tenure as the Allen County Assessor. The Assessor objected to this question, arguing it was irrelevant. The ALJ took the objection under advisement and instructed O’Day to answer the question. We find this testimony at least marginally relevant to O’Day’s credibility as an expert witness and overrule the objection.

#### **PENDING MOTIONS**

20. As discussed above, this case involved extensive pre-hearing litigation. We have already ruled on a number of motions via separate orders. We now address those motions that are still pending.
21. Herber filed a “Motion to Compel Discovery” in which he asked the Board to order the Assessor to provide a copy of a recording of a PTABOA hearing from April 13, 2016. The Assessor responded that they provided Herber with recordings of several other PTABOA hearings, but that no recording was made for that hearing because the recording equipment malfunctioned. We denied Herber’s motion via separate order. Herber then filed a “Motion for Default Judgment” in which he argued that the Board should order a default judgment against the Assessor because without that recording “[i]t is now impossible and futile to successfully argue and win my case.” Herber did not allege any specific reason why a recording of a PTABOA hearing would be relevant evidence in this appeal, given our proceedings are *de novo*. In addition, because Herber withdrew his appeals for the prior assessment years as required by the preliminary injunction, we are left to decide only the 2017 assessment year. It is difficult to fathom

how a recording of a 2016 PTABOA hearing could have any bearing whatsoever on a 2017 appeal. Finally, we note that even if that recording had some relevance to this appeal, we would not grant the extraordinary relief of default just because the PTABOA's recording equipment malfunctioned. Thus, Herber's Motion for Default Judgment is denied.

22. Herber filed a "Motion to Strike Entire April 6, 2018 Deposition," apparently asking the Board to strike a deposition taken in the Allen Superior Court case. Neither party has submitted any part of that deposition to the Board. For that reason, we find Herber's motion to strike is moot.
23. Shortly before the hearing, Herber filed another Motion to Compel Discovery. Although unclear on its face, Herber's argument at the hearing indicated that he was seeking documents related to the Assessor's and PTABOA's procedures for recordkeeping. The Assessor responded that she sent Herber the only document that related to his request, the county's retention schedule. Herber denied that he received the retention schedule. He also argued that there should be additional documents beyond the retention schedule. When the ALJ asked Herber why he needed those documents to proceed with his case he stated "I want to find out why things are disappearing..." We find that Herber has not provided sufficient grounds to warrant the Board's intervention in this discovery issue. Thus, his Motion to Compel Discovery is denied.
24. Herber filed a "Motion for Costs" in which he asked the Board for costs related to copies, postage, mileage, and parking. This motion is denied.

#### **FINDINGS OF FACT**

25. Herber owns a home located at 3901 N. Washington Rd. in Fort Wayne, Indiana. The house sits on approximately 1.18<sup>4</sup> acres of land. It is subject to two sewer easements, a

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<sup>4</sup> Herber provided two surveys of the subject property. The first shows 1.176 acres and the second shows 1.178 acres. *Pet'r's Exs. 1, 2.*

utility easement, and a right-of-way for a public road. In 2017, he was assessed for 1.14 acres of land. *Herber testimony; O’Day testimony; Pet’r Exs. 1, 2, 3, 5, 7; Resp’t Ex. 2.*

## CONTENTIONS

### a. Herber’s arguments

26. At the hearing, Herber made a number of claims regarding how his property was assessed in prior assessment years, as well as the conduct of the Assessor, her attorney, and her employees. Herber failed to show any reason that these allegations, even if true, would require a change in his 2017 assessment. *Herber testimony.*
27. Herber claimed that his property had four “appurtenances” that should not be included in the land assessed to him based on Indiana Code 6-1.1-2-4<sup>5</sup> because he did not control the property. These included the sewer and utility easements, as well as a right-of-way for a road. He also requested that his property be surveyed pursuant to I.C. § 6-1.1-4-14(c). *Herber testimony; Pet’r Exs. 1-5.*

### b. The Assessor

28. The Assessor denied a number of the allegations described above. The Assessor also argued that even if true these allegations would not merit any changes in the 2017 assessment. The Assessor also testified about Herber’s conduct during the course of litigation, as well as the amount of time and resources spent by her office in responding to his numerous appeals. *O’Day testimony; Schreiber argument.*
29. The Assessor argued that the land subject to the three easements should be assessed to Herber. O’Day testified that there was no deduction in I.C. § 6-1.1-4-14, any other part of the Indiana Code, or the Property Assessment Manual and Guidelines, for the type of easements the subject property had. She also testified that the subject property was being assessed consistently with the rest of the neighborhood. *O’Day testimony; Schreiber argument.*

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<sup>5</sup> Herber also referenced I.C. § 6-1.1-4-14.

30. The Assessor first argued that the right-of-way for the road did not fall under I.C. § 6-1.1-4-14 because the road was not a “public highway.” Nevertheless, O’Day testified that the land adjacent to the roadway was not being assessed. She supported this testimony with the property record card and the aerial photograph. She also stated that she did not send the surveyor out because the subject property did not have any of the land described in I.C. § 6-1.1-4-14 including land “next to a public highway.” *O’Day testimony; Resp’t Ex. 2; Pet’r Ex. 7.*

### ANALYSIS

31. As discussed above, both parties made extensive references to events that happened during the course of litigation. Apart from the discovery issues addressed above, we find that none of this testimony has any impact on the merits of Herber’s claims for the 2017 assessment year.
32. We first address the land covered by the right-of-way for the road. We agree with Herber that I.C. § 6-1.1-4-14 requires that land within a right-of-way of a public highway should not be assessed. The Assessor argued that the road next to the subject property was not a public highway. This argument is incorrect. I.C. § 6-6-1.1-103(j) states:
- “Public highway” means the entire width between the boundary lines of every publicly maintained way in Indiana including streets and alleys in cities and towns when any part of the way is open to public use for vehicle travel.”
- The road next to the subject property clearly meets this definition. But we credit O’Day’s testimony that the land under the right-of-way is not being assessed. In addition, her testimony is supported by examining the surveys provided by Herber and the property record card. Herber’s surveys show the subject property’s acreage to be 1.176 acres and 1.178 acres. According to the property record card, Herber is only being assessed for 1.14 acres. Thus, there are approximately .03 acres that are not being assessed. This supports O’Day’s testimony and shows that Herber is already receiving

the relief he is requesting regarding the road's right of way. Herber himself provided no testimony or evidence that leads us to believe the land subject to the right-of-way is being assessed.

33. We now turn to the sewer and utility easements. The Assessor is correct that Herber has not shown that those easements are the type defined in Ind. Code § 6-1.1-4-14 such as public drainage ditch, a levee, or a right-of-way for a railroad or public highway.
34. Herber has also claimed that he should not be assessed for the land subject to the easements based on I.C. § 6-1.1-2-4. This statute does not create a deduction, nor does it exempt any land from assessment. It only deals with who is responsible for the taxes. I.C. § 6-1.1-2-4(a) provides that the owner of real property property is responsible for the taxes unless there is a recorded lease assigning or contract assigning the responsibility for the taxes to another entity that holds, possesses, controls, or occupies the property. Herber argues that he does not “control” the land because the easements restrict his use of the land, such as the ability to build improvements over the easements. We disagree. He still holds the majority of the rights to this property including the right of possession (subject to the restrictions of the easements), and the right to sell, lease, or mortgage the property. In addition, even were we to accept Herber’s argument that he does not control the property, this statute offers him no relief. Herber has provided the recorded easements. None of those easements provide for an assignment of property taxes, nor refer to property taxes at all. Thus, Herber is responsible for the taxes for the land subject to the easements.
35. Finally, we address Herber’s request for a county surveyor under I.C. § 6-1.1-4-14. The Assessor argued that she was not required to send a surveyor because the road adjacent to the subject property was not a public highway. As discussed above, the Assessor is incorrect. The road is a public highway. I.C. § 6-1.1-4-14(c) provides that if an assessor and landowner “fail to agree on the amount of land...the assessor shall have the county surveyor make a survey to determine the amount of land so described.” It is troubling

that the Assessor failed to comply with this statute. Nevertheless, this failure does not warrant any relief. The Board is a creation of the legislature, and it has only those powers conferred by statute. *Whetzel v. Dep't of Local Gov't Finance*, 761 N.E.2d 904 (Ind. Tax Ct. 2002) (citing *Matonovich v. State Bd. of tax Comm'rs*, 715 N.E.2d 1018, 1021 (In. Tax Ct. 1999)). No statute gives us the authority to order the Assessor to comply with this statute. Instead, Herber should seek a mandamus action in a court of general jurisdiction.

#### SUMMARY OF FINAL DETERMINATION

36. The evidence shows that Herber is not being assessed for the land abutting the roadway. In addition, Herber has failed to show that he should not be assessed for the land subject to the easements, nor has he proven any other errors in the assessment. Thus, we order no change to the assessment.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

**- APPEAL RIGHTS -**

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of the date of this notice.

The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.